RECENT DECISIONS.

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AGENCY—CARRIERS—EMPLOYEE'S AUTHORITY TO CONTRACT UNDER NECESSITY.—The plaintiff, an employee of a glass company, was injured through the negligence of the railroad while in one of its cars, contrary to the rules of the company, but in accordance with a custom which, although unknown to the company, was acquiesced in by the switching crew. He sues on the theory that this custom had become part of the contract of shipment. *Held,* he could not recover. *Pittsburg, C., C. & St. L. R'y. Co.* v. *Hall* (Ind. 1910) 90 N. E. 498.

As a general rule a train conductor does not have apparent authority to contract for the company. *Peninsular R. R. Co.* v. *Gary* (1886) 22 Fla. 356. Yet certain exceptions to this rule are recognized. If the conductor does contract and the general officers of the company, with notice of such contract, fail to repudiate it the company is liable thereon. *Terre Haute & Indiana R'y. Co.* v. *Stockwell* (1888) 118 Ind. 98. Further, in some jurisdictions, the conductor has the right to contract for necessary service, *Fox* v. *C., St. P. & K. C. R'y. Co.* (1892) 86 Iowa 368, or medical assistance, *Terre Haute & Indiana R'y. Co.* v. *McMurray* (1884) 98 Ind. 358, but only in cases of actual emergency. *Sevier* v. *Birmingham, Sheffield & Tenn. R. R. Co.* (1890) 92 Ala. 258. While a third exception has been suggested in cases where the authority to contract may be inferred from a custom of the trainmen, it seems clear that unless such custom is brought to the knowledge of the general officers of the company the alleged contract of the agent is not binding. *Penn. R. R. Co.* v. *Coyer* (1904) 163 Ind. 631. Since the principal case falls within none of the recognized exceptions to the rule, the mere acquiescence of the train crew in the custom did not make it a part of the contract of shipment; and therefore the plaintiff being wrongfully on the premises could not recover.

BANKS AND BANKING—DEPOSIT OF MONEY FOR TRANSMISSION—TRUSTEE OR DEBTOR.—The relator, a foreign banker, received money for transmission to Austria. He deposited the money on his own account and sent an order to his agent in Austria to pay the amount to the consignee. Later he recalled the order. *Held,* the relator was a fiduciary and was liable for embezzlement. *People ex rel. Zotti* v. *Flynn* (1909) 120 N. Y. Supp. 511.

The ordinary relation between a banker and a depositor is that of debtor and creditor. *Foley* v. *Hill* (1848) 2 H. L. Cas. 28. The banker, however, is said to become a trustee if the deposit is made for some specified or particular purpose. *Libby* v. *Hopkins* (1881) 104 U. S. 303. Thus where one sends a remittance to a bank to meet a note to become due, the banker is not a debtor but a trustee. *People* v. *City Bank of Rochester* (1884) 96 N. Y. 32. In theory this rule should be limited to cases where there is a clear intention that the fund deposited should be set apart and not mingled with the general assets of the bank, as the creation of a specific *res* is one of the essentials of a trust; *Wetherell* v. *O'Brien* (1892) 140 Ill. 146; although a viola-

tion of this original intention by the banker does not destroy the trust. *Kimmel* v. *Dickson* (1894) 5 S. D. 221. It seems doubtful whether such an intention existed in the principal case. But the banker, originally a debtor, may subsequently become a trustee in the course of the transaction. *City of St. Louis* v. *Johnson* (1879) 5 Dill. 241. Thus where a banker gave an order to his agent to apply funds to a particular purpose he became a trustee for the depositor. *Farley* v. *Turner* (1857) 26 L. J. Ch. 710. These cases might be explained on the theory that the trust *res* is the banker's claim against his agent. The holding of the principal case, which is sustained by previous New York decisions, *Johnson* v. *Whitman* (N. Y. 1871) 10 Abb. Prac. [N. S.] 111, may be supported on this ground.

BANKS AND BANKING—SAVINGS BANKS—PAYMENT OF FORGED DRAFTS.—Plaintiff deposited money in a savings bank. Later his bankbook was stolen and presented by the thief, together with a forged draft. The signatures of the depositor and the thief were entirely different, but the latter correctly answered questions asked by the teller. *Held,* Lehman, J. dissenting, the case should have gone to the jury to see whether the bank exercised reasonable care in paying the draft. *Kenny* v. *Harlem Sav. Bank* (1909) 120 N. Y. Supp. 82.

Ordinarily payments made upon forged instruments are at the peril of the bank, *Shipman* v. *Bank of the State of N. Y.* (1891) 126 N. Y. 318, 327, even though the forgery is so skillful that it could not be detected. *Crawford* v. *West Side Bank* (1885) 100 N. Y. 50. As regards savings banks, however, a different rule applies and the bank is not an absolute insurer, but is only required to use reasonable care, *Sullivan* v. *Lewiston Inst. for Savings* (1869) 56 Me. 507; *Kimball* v. *Norton* (1879) 59 N. H. 1; even as to payments made after the death of the depositor. *Kelley* v. *Buffalo Sav. Bank* (1904) 180 N. Y. 171, but see *Mahon* v. *So. B'klyn Sav. Inst.* (1903) 175 N. Y. 69. It may, however, bind itself to a higher degree of care, *Allen* v. *Williamsburg Sav. Bank* (1877) 69 N. Y. 314, though it cannot, by contract, lessen the duty to use reasonable care, imposed upon it. *Kummel* v. *Germania Sav. Bank* (1891) 127 N. Y. 488. It has been held that contributory negligence on the part of the depositor is no defense. *Geitelsohn* v. *Citizens Sav. Bank* (N. Y. 1896) 17 Misc. 574, but see *Wall* v. *Emigrants Industrial Sav. Bank* (N. Y. 1892) 64 Hun. 249. If the circumstances are not suspicious, the question of due care is one for the court, *Appleby* v. *Erie County Sav. Bank* (1875) 62 N. Y. 12; *Geitelsohn* v. *Citizens Sav. Bank supra,* but if they are suspicious, as where the signatures are entirely different, *Kummel* v. *Germania Sav. Bank supra,* or no questions were asked by the bank, *Saling* v. *German Sav. Bank* (N. Y. 1889) 15 Daly 386, or the forger was of a different sex from the depositor, *Allen* v. *Williamsburg Sav. Bank supra,* the question is one for the jury. Since, therefore, in the principal case the signatures were entirely different and the circumstances were suspicious, the court was justified in sending the case to the jury.

CARRIERS—COUPON TICKETS—TIME LIMITATIONS.—The plaintiff bought a through coupon ticket over five connecting railroads. The ticket contained a stipulation that it was "good for one continuous passage, to be void unless used to destination before midnight of October fourth." On account of delays caused by the prior carriers the plaintiff was unable to present his ticket to the final carrier until October fifth and was ejected from the train because his ticket had expired.

Held, no damages could be recovered from the final carrier for the ejectment. *Brian* v. *Oregon Short Line R. Co.* (Mont. 1909) 105 Pac. 489. See Notes, p. 345.

CARRIERS—DUTY TO RECEIVE ALL APPLICANTS FOR TRANSPORTATION.—The plaintiff sues for the defendant's refusal to accept the intestate as a passenger from Boston to Ireland. The intestate was accompanied by an attendant but was so ill as to require constant medical attention, on account of which he was refused passage. *Held,* the carrier was not bound to receive her as an ordinary passenger. *Connors* v. *Cunard S. S. Co.* (Mass. 1910) 90 N. E. 601. See Notes, p. 345.

CONFLICT OF LAWS—DOMICILE OF CHOICE—IMMISCIBILITY.—The testator, whose domicile of origin was in Maine, made his permanent home in Shanghai, where his will was probated and the estate distributed. Application for probate was granted in Maine as the decedent's domicile, the will being informally executed according to the rules of that state. *Held,* on appeal, the order must be reversed, the decedent having acquired a domicile in Shanghai. *Mather* v. *Cunningham* (Me. 1909) 74 Atl. 809.

The acquisition of a domicile of choice depends, as generally stated, upon a concurrence of the *factum* and the *animus, i. e.* the presence of the person in the locality which he has the intention of making his abode for an unlimited time. *Bell* v. *Kennedy* (1868) L. R. 1 H. L. Sc. 307. But the possibility of acquiring a domicile in Oriental communities has been denied because of the incompatible nature of such communities to the European, in spite of clear evidence of intention. *In re Tootal's Trusts* (1883) L. R. 23 Ch. Div. 532. This doctrine of immiscibility would hardly seem justifiable, since originally the immiscible nature of the community was merely regarded as raising a strong presumption against the requisite intention. *The Indian Chief* (1800) 3 C. Rob. Admr. 12; *Maltass* v. *Maltass* (1844) 1 Rob. Eccles. 67. Moreover, domicile is apparently treated solely as a relation of the individual to a locality. *Udny* v. *Udny* (1869) L. R. 1 H. L. Sc. 441. Since the acquisition of a new domicile is important solely in view of the resultant application of its laws to the status of the individual, it is conceivable that the courts were actuated by considerations of possible hardship arising from the application of incongruous laws. See *Maltass* v. *Maltass supra.* This is obviated, it would seem, where the individual is exempted from local law because of extraterritoriality, for the law of the country of origin is in such event applicable. The difficulty that there must be subjection to the sovereign as distinguished from the local law, *In re Tootal's Trusts supra; Abd-ul-Messih* v. *Farra* (1888) L. R. 13 App. Cas. 431, is obviated by the fact that extraterritorial law, existing in a territory by treaty, is in effect the law of the sovereign, as shown in the principal case. Where there is no extraterritoriality, recourse to the complication of the doctrine of immiscibility may be avoided by a simple refusal on the part of the forum to apply foreign law repugnant to local policy. Westlake, Pri. Int. Law (4th ed.) p. 321.

CONTRACTS—REWARDS—PUBLIC OFFICERS.—The defendant, a public officer in New York, after having secured the apprehension of a murderer in California by means of a decoy letter written as a result of information furnished by the plaintiff, went there and brought the accused back. The defendant then sought to participate in the distri-

bution of a reward offered for the apprehension and conviction of said murderer. *Held,* he could not participate since the services were within the scope of his official duties. *Rogers* v. *McCoach* (1909) 120 N. Y. Supp. 686.

It is universally held that public officers are not entitled to accept rewards offered by private individuals for services rendered within the scope of their official duties, *Matter of Russell's Application* (1884) 51 Conn. 577, because there is no consideration for the offerer's promise, *Pool* v. *City of Boston* (1849) 5 Cush. 219, and because a recovery in such cases is contrary to public policy, as tending to bribery and extortion. *Hogan* v. *Stophlet* (1899) 179 Ill. 150. When the reward is offered by public authorities, however, the same reasons of public policy have been held inapplicable, *U. S.* v. *Matthews* (1899) 173 U. S. 381, although some courts refuse to make any such distinction. *Lees* v. *Colgan* (1898) 120 Cal. 262. But it would seem that a public officer may receive a reward for services outside the scope of his official duties, since in that case he is acting in his private capacity, *Curren* v. *Collier* (1907) 7 Indian Ter. 148; *Harris* v. *More* (1886) 70 Cal. 502, although he cannot recover for unusual exertions in the performance of his duty. *Hatch* v. *Mann* (N. Y. 1835) 15 Wend. 44. So, information furnished by a constable which leads to a conviction has been held outside of the constable's official duty. *England* v. *Davidson* (1840) 11 Ad. & El. 856. Furthermore, a sheriff who without process pursues a criminal into another jurisdiction and apprehends him there is acting in his private capacity, *Gregg* v. *Pierce* (N. Y. 1860) 53 Barb. 387, although the contrary is true if he is merely carrying out the orders of a superior. *Atwood* v. *Armstrong* (N. Y. 1905) 102 App. Div. 601. In the principal case the services rendered were clearly within the scope of the officer's official duties.

CRIMINAL LAW—EFFECT OF FAILURE OF ARRAIGNMENT AND PLEA.—The defendant appealed from conviction on the charge of selling liquor to a minor, on the ground that there had been no arraignment or plea. *Held,* two judges dissenting, the defendant waived such technical defects by appearing with counsel and proceeding with the trial. *Hack* v. *State* (Wis. 1910) 124 N. W. 492.

At common law failure of arraignment and plea in criminal proceedings was a fatal defect. *Crain* v. *U. S.* (1896) 162 U. S. 625, 645. The defendant was deemed to waive arraignment by pleading, *Feriter* v. *State* (1870) 33 Ind. 283, but could not waive the right to plead by appearing and taking active part in the conduct of the trial. This rule was based by some courts upon the ground that it was failure of due process of law. *Crain* v. *U. S. supra;* cf. 6 COLUMBIA LAW REVIEW 357. In other cases it was said that without a plea no issue could be formed, and so no trial was had. *People* v. *Corbett* (1865) 28 Cal. 328; *State v. Hughes* (1840) 1 Ala. 655. It has even been held that the defect is not cured by the entry of a plea by the court after verdict. *Davis* v. *State* (1875) 38 Wis. 487. The decision in the principal case avowedly overrules earlier Wisconsin decisions. *Douglas* v. *State* (1854) 3 Wis. 820; *Davis* v. *State supra.* The court in the principal case regarded the defects as merely technical, especially since the prisoner was represented by counsel; and hence disregarded them under the statutory requirement that only errors affecting the substantial rights of the defendant should be grounds for reversal. The decision was limited to cases of minor offenses. Other courts, under similar statutory provisions, have applied the same rule even in cases of serious

crimes. *State* v. *Cassady* (1874) 12 Kan. 550, 561 (larceny); *State* v. *Straub* (1896) 16 Wash. 111, 113 (murder). See also *People* v. *Osterhout* (N. Y. 1884) 34 Hun 260; *contra People* v. *Corbett supra.* The principal case is in accord with the liberal modern view, and would seem sound, the rights of the defendant being properly safeguarded by the receipt of all evidence offered on his behalf irrespective of plea.

DAMAGES—GENERAL ALLEGATION—PROOF OF SPECIAL DAMAGE.—The plaintiff brought an action for personal injuries alleging that he was injured "through his head, skull, eyes, and bruises to his right leg and body." At the trial he was permitted to prove that his hearing was permanently impaired. *Held,* three judges dissenting, the evidence should have been excluded, as the injury, not being a necessary result of the defendant's act, must be specially alleged in the complaint. *Keefe* v. *Lee* (N. Y. 1909) 90 N. E. 344.

Under the general allegation of damages, all damages naturally and necessarily resulting from the act complained of may be proved, *T. & P. Ry. Co.* v. *Curry* (1885) 64 Tex. 85, and the fact that the plaintiff has specified a part of his general damage does not prevent him from proving other general damage. *Hutchinson* v. *Granger* (1841) 13 Vt. 386, 394. Thus the law will imply physical pain and mental suffering from an allegation of bodily injury. *T. & P. Ry. Co.* v. *Curry supra.* But damages which do not necessarily flow from the injury, are regarded as special and must be alleged in the complaint. *Sealey* v. *Metropolitan St. R. Co.* (N. Y. 1903) 78 App. Div. 530. On this ground a distinct disease developing from the injury, but one which does not always necessarily result from it must be specially alleged, *Wilkins* v. *Nassau Newspaper Delivery Co.* (N. Y. 1904) 98 App. Div. 130, and deafness is generally regarded as special damage. *Piltz* v. *Yonkers R. R. Co.* (N. Y. 1903) 83 App. Div. 29. Since the basis of the decisions is to avoid surprise, the complaint may generally be amended at the trial by the insertion of the necessary allegation unless the defendant can show that he is prejudiced thereby. *Miller* v. *Garling* (N. Y. 1856) 12 How. Prac. 203. Furthermore, the appellate court may treat the complaint as amended. *Clemens* v. *Davis* (N. Y. 1875) 6 T. & C. 523. As brought out in the dissenting opinion of the principal case, the defendant was evidently not at all misled and therefore the better practice would have been to admit the evidence.

DAMAGES—TRESPASS—RENTAL VALUE.—The plaintiff sued in trespass *quare clausum fregit* claiming damages for rent of the land trespassed upon. *Held,* the plaintiff could not recover such damages, having abandoned the land, not because of the trespass, but thereafter at the request of a third person. *Brown* v. *Floyd* (Ala. 1909) 50 So. 995.

The measure of damages in actions *ex delicto* is compensatory of the injury actually sustained, *Worcester* v. *Gt. Falls etc. Co.* (1856) 41 Me. 159, and so in trespass *quare clausum fregit,* damages are given either for actual injury to the land, *Mayor* v. *City of Springfield* (1884) 138 Mass. 70; *Jones* v. *Gooday* (1841) 8 Mees. & W. 146, or for consequential injury to the owner. *White* v. *Moseley* (1829) 8 Pick. 356. Therefore, whatever loss the owner sustains with respect to the beneficial use of land would seem properly to fall within the latter category. *Walters* v. *Chamberlain* (1887) 65 Mich. 333; *Cavanagh* v. *Durgin* (1892) 156 Mass. 466. Consequently, the rental value during the unlawful detention is recoverable. *Frizzell* v. *Duffer* (1894) 58 Ark. 612;

Oklahoma City v. *Hill Bros.* (1897) 6 Okla. 114. But upon ouster no recovery for continued occupation can be had until re-entry. *Holmes* v. *Seeley* (1838) 19 Wend. 507. After recovery in ejectment rental value is recoverable in an action for *mesne* profits, *Holmes* v. *Davis* (1859) 19 N. Y. 488, which although in the nature of trespass *quare clausum fregit, Thompson* v. *Bower* (1871) 60 Barb. 463; *Columbia etc. Ry Co.* v. *Histogenetic Co.* (1896) 14 Wash. 475, is generally regarded in substance as an assumpsit for use and occupation. *Woodhull* v. *Rosenthal* (1875) 61 N. Y. 382. But assumpsit for use and occupation will not lie where the defendant claims adversely, *Collyer* v. *Collyer* (1889) 113 N. Y. 442, for no implication to pay rent can arise from a tortious entry upon land. *Biglow* v. *Biglow* (N. Y. 1902) 75 App. Div. 98. Since there was no ouster and re-entry in the principal case and the plaintiff by voluntary abandonment disclaimed his right to the beneficial enjoyment, rental value was properly denied.

EJECTMENT—PLAINTIFF WITHOUT TITLE—PRIOR POSSESSION OF PUBLIC LANDS.—The plaintiff had established a constructive possession of submerged land in the waters of a navigable bay. *Held,* as a trespasser on public land, he could not maintain ejectment against the disturber of his possession. *Bass* v. *Ramos* (Fla. 1909) 50 So. 945.

A plaintiff in ejectment must recover on the strength of his own, and not the weakness of the defendant's title. *Seymour* v. *Creswell* (1881) 18 Fla. 29. But paper title is not essential as against a mere intruder. *Wilson* v. *Fine* (1889) 38 Fed. 789. It is said that actual prior possession raises a presumption of title, *Bradshaw* v. *Ashley* (1901) 180 U. S. 59, but it is held that the intruder cannot rebut this presumption by showing that the title is in a third party. *Humphreys* v. *McCall* (1858) 9 Cal. 59; *Schauber* v. *Jackson* (N. Y. 1828) 2 Wend. 3. So it appears that the theory underlying this action is that possession is to be protected for the sake of promoting the peace and discouraging trespass. *Bates* v. *Campbell* (1870) 25 Wis. 613. Considering the matter of title as important, the principal case is correct in holding that no title can be presumed to be in the plaintiff, since in the case of land under navigable waters the title is in the state, *Ill. Cent. R. R.* v. *Ill.* (1892) 146 U. S. 387, in trust for the whole people, *State* v. *Gerbing* (1908) 56 Fla. 603, and as that trust cannot be alienated, *Ill. Cent. R. R.* v. *Ill., supra,* the state cannot grant an individual title to such land as shall interfere with this easement of the public. *Sullivan* v. *Richardson* (1894) 33 Fla. 1. However, from the possessory nature of the action of ejectment it should not avail the defendant any more to show that the state could not have granted title to the plaintiff, than in the usual case of private land, to show that, as a matter of fact, the plaintiff did not have title. But see *Pierce* v. *Kennedy* (1891) 2 Wash. 324. However, the decision is to be supported on the consideration of public policy that a trespass on state lands held for the use and enjoyment of the public should not be encouraged.

EMINENT DOMAIN—COMPENSATION—FEE SUBJECT TO EASEMENT.—The owner conveyed property abutting on a proposed city street but retained the fee within the street lines. *Held,* on condemnation, he was entitled only to nominal damages. *In re 177th St.* (1909) 120 N. Y. Supp. 354.

Though the decision of the principal case, that, as a matter of law, the value of the fee of a proposed city street, encumbered by private easements of abutting owners, is of only nominal value, seems extreme,

it finds considerable support in the authorities. It is true that substantial compensation has been given for the taking of the fee possessed by the owner of abutting property, but the decisions which allowed such award seemed to consider entirely the damage to the abutting property. *City of Buffalo* v. *Pratt* (1892) 131 N. Y. 293, 300. Considering the situation in the principal case, namely, ownership only of the fee, it may be argued that since the easements with which it is encumbered are private (cf. *Matter of City of New York* (1909) 196 N. Y. 286 where the easements were public) and hence there is a possibility by purchase or otherwise of extinguishing them, the land is of substantial value; but in answer to this are to be considered the decisions which hold that when a public easement over such land is condemned, only nominal damages are to be given, *In re Vil. of Olean* v. *Steyner* (1892) 135 N. Y. 341; *Matter of Adams* (1894) 141 N. Y. 297; *Walker* v. *City of Manchester* (1878) 58 N. H. 438, even though the condemnation in this latter situation just as effectively destroyed the possibility of securing the use of an unencumbered fee. Further arguable elements of value are possible surface uses of the strip of land by erections over the fee or utilization of the sub-surface area by vaults or similar constructions. However, to consider this element of value appreciable it should appear from the character of the neighborhood that such uses are sufficiently probable in the immediate future to give a present market value to the fee. *Laflin* v. *Chicago W. & N. R. Co.* (1887) 33 Fed. 415.

EQUITY—PROTECTION OF EASEMENTS.—The defendant blocked the complainant's right of way by a wire fence and resisted his petition for an injunction, because the premises were in the possession of a tenant of the complainant. *Held,* that as the obstruction was in denial of complainant's rights and also an injury to the reversion, he was entitled to maintain this action. *Webb* v. *Jones* (Ala. 1909) 50 So. 887. See notes, p. 355.

FEDERAL PRACTICE—TWO GROUNDS OF JURISDICTION—PROPER DISTRICT FOR SUIT.—Resident shippers sued to restrain foreign interstate carriers from putting into effect a proposed advance in freight rates. *Held,* Mr. Justice Harlan dissenting, under U. S. Comp. Stat. 1901, p. 508, reading * * * "no civil suit shall be brought in any other district than that whereof defendant is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plantiff or the defendant," that suit could be brought only in the district where defendant was an inhabitant, the jurisdiction not resting solely on the ground of diversity of citizenship. *Macon Grocery Co.* v. *Atl. Coast Line R. R. Co.* (1909) 30 Sup. Ct. Rep. 184.

By the act of Aug. 13th, 1888, which superseded the act of March 3rd, 1875, Congress by striking out the words, "or in which he shall be found," attempted to limit the districts in which a federal suit might be brought. See *Shaw* v. *Quincy Mining Co.* (1891) 145 U. S. 444. Following this apparent policy of limitation, later courts have held that the word "inhabitant" means "citizen" rather than "resident", *Galveston etc. Ry.* v. *Gonzales* (1893) 151 U. S. 496; *U. S.* v. *Northern Pac. R. R. Co.* (1905) 134 Fed. 715, and have refused to allow a corporation of one state to sue a company, incorporated in another, in a

third state where the defendant corporation had its principal place of business; *Shaw* v. *Quincy Mining Co. supra; In re Keasbey* (1895) 160 U. S. 222; while if the state of incorporation be divided into more than one federal district, suit must be brought in the district where its principal office is located. *Galveston etc. Ry* v. *Gonzales supra.* Where the jurisdiction of the court arises solely from the fact of diversity of citizenship, suit may be maintained in the district where either the plaintiff or the defendant resides. *McCormick etc. Co.* v. *Walthers* (1889) 134 U. S. 41; *St. Louis etc. Co.* v. *Terre Haute etc. Co.* (1887) 33 Fed. 385. Until the principal case, the question as to the jurisdiction where the cause does not wholly arise from diversity of citizenship, seems never to have arisen, but there are *dicta* to the effect that the suit must be in defendant's district. *McCormick etc. Co.* v. *Walthers supra; In re Keasbey supra.* In view, therefore, of the use of the word "only" in the statute, the tendency to limit the districts in which suit may be brought, and the repeated *dicta* of the Supreme Court, the majority view would appear preferable.

HIGHWAYS—DEDICATION—SALE OF LOTS ON PROPOSED STREET.—After condemnation proceedings had been instituted to open a street, and an award had been made, an action of partition was brought by the owners in common of the property affected. The proposed street was excluded from partition, and the partition map and the referee's deeds recognized the proposed street as a boundary. *Held,* two judges dissenting, this constituted a dedication. *In re Johnson Ave.* (1909) 120 N. Y. Supp. 798.

The first essential element of a common law dedication is an intention of the owner to appropriate the land to a public use. *Town of Bethel* v. *Pruett* (1905) 215 Ill. 162. In the absence of facts raising an equitable estoppel, *cf. Holly Grove* v. *Smith* (1896) 63 Ark. 5, the intention must be satisfactorily and unequivocally proven. *Lynchburg Traction Co.* v. *Guill* (1907) 107 Va. 86. The actual intention must be inferred from all the facts and circumstances of the case. *Waggeman* v. *North Peoria* (1895) 155 Ill. 545. Thus, while such inference may arise when the property is plotted into lots, blocks and streets, and lots are sold abutting on these streets, *Quicksall* v. *Philadelphia* (1896) 177 Pa. St. 301, the intention is not to be inferred if no lots are sold, *Holly Grove* v. *Smith supra,* nor if the lots sold do not abut on the plotted street. *City of Eureka* v. *Fay* (1895) 107 Cal. 166. Even where the extension of an existing highway was fenced off from the abutting property, shade trees planted along the side, and covenants entered into referring to this extension as a street, evidence was admitted to show that there was no actual intention to dedicate. *Waggeman* v. *North Peoria supra.* The view of the dissenting opinion in the principal case, that the recognition of the proposed street was on the assumption that the award would be confirmed, and so did not indicate an intention to dedicate, seems the more reasonable.

INJUNCTIONS—CUTTING TIMBER—ADEQUACY OF DAMAGES AT LAW.—The plaintiffs sought an injunction to restrain the defendants from boxing trees, carrying away turpentine, or cutting timber on the plaintiffs' land, which was chiefly valuable for such timber. *Held,* the remedy in damages was of such doubtful adequacy that equity may properly intervene, though under different circumstances an injunction against

cutting ordinary timber might be denied. *Graves* v. *Ashburn* (1909) 30 Sup. Ct. Rep. 108.

In the early practice of the court of equity bills for relief were entertained without regard to the existence of a legal remedy, *Bole* v. *Thomas at Well* (1384) 10 Selden Soc. 105; *Walker* v. *Archer* (1401) 10 Selden Soc. 53, and the existence of such a remedy was no defense. *Wood* v. *Tirrell* (1577) Cary Ch. 84. But with a complete demarcation between the jurisdiction of common law and equity in the following centuries it became the rule that equity should not interfere where there was a remedy at law. *Mortimer* v. *Cottrell* (1789) 2 Cox Eq. 205; *Stevens* v. *Beekman* (N. Y. 1814) 1 Johns. Ch. 318. This rule was strictly applied especially in trespass. *Mogg* v. *Mogg* (1786) 2 Dickens Ch. 670; *Jerome* v. *Rosa* (N. Y. 1823) 7 Johns. Ch. 315. The present tendency of the courts, while recognizing that equity should not intervene where there is a plain, complete, and adequate remedy at law, is to regard a legal remedy inadequate if not as effectual and certain as the equitable remedy. *Driscoll* v. *Smith* (1903) 184 Mass. 221; *Walla Walla* v. *Walla Walla Water Co.* (1898) 172 U. S. 1, 12. Where, therefore, minerals or timber constitute the principal value of land, their removal will be enjoined either temporarily, *Wadsworth* v. *Goree* (1892) 96 Ala. 227, or permanently, as destructive to the property and not susceptible of adequate compensation in damages. *Brown* v. *Solary* (1896) 37 Fla. 102. If their value is not of such peculiar importance an injunction may be refused. *Powell* v. *Rawlings* (1873) 38 N. D. 239; *Keller* v. *Bullington* (1893) 101 Ala. 267. Considering the cases cited in the principal case, *King* v. *Stuart* (1897) 84 Fed. 546; *Peck* v. *Ayers Tie Co.* (1902) 116 Fed. 273, the decision, though somewhat novel in expression, is merely an application of these principles, and does not establish a new test for equitable relief, *i. e.*, the doubtful adequacy of damages at law.

MASTER AND SERVANT—INJURY TO MINOR SERVANT—MISREPRESENTATION AS TO AGE.—The plaintiff by falsely representing that he was of full age secured employment as a brakeman from the defendant, which had a rule forbidding the employment of minors in that capacity. The plaintiff was injured by the negligence of the defendant. *Held,* the plaintiff's misrepresentation should not bar him from recovery as a servant of the defendant. *Lupher* v. *A., T. & S. F. R. Co.* (Kan. 1910) 106 Pac. 284.

The status of master and servant ordinarily arises by contract, either express or implied. Wood, Master and Servant § 4. Where one of the parties is under a legal disability the contract of employment is voidable. *Craighead* v. *Wells* (1855) 21 Mo. 404, although until terminated a *de facto* status exists. 10 COLUMBIA LAW REVIEW 1, 11. Furthermore, a fraudulent misstatement which induces a meeting of the minds as to the subject matter does not vitiate the contract but merely makes it voidable. *Edmunds* v. *Merchants' Desp. Trans. Co.* (1883) 135 Mass. 283. Until avoided, it would seem that the corporation owes the same degree of care to the author of the misstatement as to other servants. *L. S. & M. S. R. Co.* v. *Baldwin* (1899) 19 Oh. Cir. Ct. 338; *Matlock* v. *W. G. & St. L. R. Co.* (1906) 198 Mo. 495. The contrary result has been reached under similar conditions on the theory that the deceiver never became a servant. *N. & W. R. Co.* v. *Bondurant* (1907) 107 Va. 515. Similarly, the purchaser of a

reduced rate ticket secured by false statements has been held merely a trespasser. *Fitzmaurice* v. *N. Y., N. H. & H. Ry. Co.* (1906) 192 Mass. 159. While both decisions would seem questionable on a strict application of contract principles, the latter case may be distinguished and justified on the ground that there, unlike the principal case, the plaintiff's fraud was substantial and aggravated in that it secured a service for which she did not render an equivalent. Since the railway has a remedy in an action of deceit for any damages caused by the false statement, *L. S. & M. S. Ry. Co.* v. *Baldwin supra,* and since the plaintiff would unquestionably be barred had the accident been in any way attributable to his immaturity, *McDermott* v. *I. F. & S. C. Ry. Co.* (Ia. 1891) 47 N. W. 1037, the principal case seems to represent the sounder view.

NEGLIGENCE—VIOLATION OF STATUTE AS A BAR TO RECOVERY.—The plaintiff, while standing for a short time between the poles of his push-cart, as close to the curb as possible, while fixing his goods for the night was injured by the defendant's negligence. *Held,* his unlawful obstruction of the street barred his recovery. *Collender* v. *Reardon* (1910) 42 N. Y. L. J., No. 124.

Contributory negligence, in order to defeat a plaintiff, must be the proximate cause from which the injury naturally resulted, *Railway Co.* v. *Hull* (1889) 88 Tenn. 33, and similarly an illegal act does not bar a plaintiff unless it is a contributing cause. Consequently, the fact that a plaintiff was disobeying a Sunday law, *Gross* v. *Miller* (1894) 93 Ia. 72, will not bar him from recovering for an injury wholly due to another's negligence, for one party to an action cannot defend by alleging a separate and distinct wrongful act of the other. *Sutton* v. *Town of Wauwatosa* (1871) 29 Wis. 1. So also under a statute requiring all automobiles to be licensed the fact that an automobile is unlicensed will not excuse a municipality for an injury due to holes in its street, *Hemming* v. *City of New Haven* (Conn. 1910) 74 Atl. 892, although if the driving of an unlicensed automobile is expressly prohibited the contrary is true. *Dudley* v. *Northampton St. Ry.* (1909) 202 Mass. 443. Considering the provision of the City charter as declaratory of the common law rule prohibiting the obstruction of a highway, the violation of such rule might well be considered a contributing cause. But every obstruction is not a violation of the rule. It is true that the following users have been held illegal obstructions: a grocer's wagon standing in the street day and night by license, although a public cart in the same situation is not; *Cohen* v. *The Mayor* (1889) 113 N. Y. 532; a pushcart vendor who for an unreasonable time remained in one place, paying no attention to passing vehicles. *Tolkon* v. *Reimer Co.* (N. Y. 1908) 125 App. Div. 695. However, the determination of whether an object is an illegal obstruction depends on whether under the particular circumstances the use of the street is reasonable in regard to the rights and convenience of the public. *Callannan* v. *Gilman* (1887) 107 N. Y. 360. Therefore, since the plaintiff in the principal case was apparently not unreasonably obstructing the street the decision would seem unsound.

NEGOTIABLE INSTRUMENTS—EFFECT OF A STIPULATION FOR ATTORNEY'S FEES IN A MORTGAGE SECURING THE NOTE.—A gave B a note negotiable on its face, secured by a mortgage containing a stipulation for the payment of attorney's fees in the event of foreclosure. *Held,* the note was negotiable. *Farmers' Nat. Bank of Tecumseh* v. *McCall* (Okl. 1910) 106 Pac. 866. See Notes, p. 352.

OFFICERS—DEFINITION OF AN OFFICE—EMPLOYMENT DISTINGUISHED.—Relator was legally appointed town-treasurer under an ordinance. *Held,* this was a public office so that the title to it might be tried by *quo warranto*. *Michael* v. *State* (Ala. 1909) 50 So. 929.

While it is difficult accurately to define an office, there are two essentials which distinguish it from a mere employment or contract. First, there must be a delegation of some portion of the sovereign power and the right to exercise it, *Answer of the Justices* (Me. 1822) 3 Greenl. 481; *State* v. *Vallé* (1867) 41 Mo. 29, that is, the duties must be official in their nature, *Collins* v. *Mayor* (N. Y. 1875) 3 Hun 681, and not the mere execution of the orders of a superior. *Smith* v. *Mayor* (N. Y. 1874) 67 Barb. 223. Second, the office must be created by law and not by contract. *U. S.* v. *Maurice* (U. S. C. C. 1823) 2 Brock. 96; *State* v. *Broome* (1897) 61 N. J. L. 115. Some jurisdictions demand a third essential, saying that to constitute an office, there must be duration and tenure, *Bunn* v. *People* (1867) 45 Ill. 397; *U. S.* v. *Hartwell* (1867) 6 Wall. 385, while others hold that if the two previous requisites exist, there is an office even though it terminate as soon as the single act is done. *State* v. *Stanley* (1872) 66 N. C. 59; *People* v. *Hayes* (N. Y. 1852) 7 How. Pr. 248. Though the facts of a payment of a salary or fees, *State* v. *Wilson* (1876) 29 Oh. St. 347, the requirements of taking an oath or giving a bond, *Baltimore City* v. *Lyman* (1901) 92 Md. 591, and the name by which the position is entitled, *State* v. *Wilson supra,* are not in themselves conclusive as to whether or not there is an office, they go far in determining its existence. On the other hand, the scope of the duty or authority should not be considered, for it is the nature of the duty and not its scope which makes the office. *People* v. *Bedell* (N. Y. 1842) 2 Hill. 196; *Shelby* v. *Alcorn* (1858) 36 Miss. 273. These principles appear correctly applied by the principal case.

OFFICERS—TESTS OF ELIGIBILITY—POLITICAL ALLEGIANCE.—An Iowa statute provided that certain police and fire commissioners should be selected from the two dominant political parties. *Held,* the imposition of political opinion as a test of eligibility to office was within the power of the legislature. *State* v. *Sargent* (Ia. 1910) 124 N. W. 339. See Notes, p. 350.

PLEADING AND PRACTICE—DIVORCE—CROSS BILL FOUNDED ON ACTS SUBSEQUENT TO BRINGING SUIT.—The defendant in a divorce action pleaded by cross bill an offence entitling him to a decree, but which had occurred subsequent to the bringing of the original action. *Held,* he was entitled to a decree thereon. *Von Bernuth* v. *Von Bernuth* (N. J. 1909) 74 Atl. 700.

At common law, as reaffirmed in early American statutes, such cross actions as set-off and counterclaim were confined to action *ex contractu* and were not allowed in tort. *Chambers* v. *Lewis* (N. Y. 1860) 11 Abb. Pr. 210. This rule follows the early practice in cases of an avowry for rent, *Sapsford* v. *Fletcher* (1792) 4 T. R. 511, in trespass, replevin, and detinue. Montagu, Law of Set-Off, 18. However, other defences only going to defeat the plaintiff's case might be pleaded even though occurring subsequent to the bringing of the suit both in law, *Sullivan* v. *Montague* (1779) 1 Doug. K. B. 106, and in equity. *Stamps* v. *Birmingham & Stour Valley R'y. Co.* (1848) 2 Phillips 673. But at law counterclaims or cross actions entitling the defendant to an affirmative judgment could not be pleaded if maturing or arising after the commencement of the original action;

Evans v. *Prosser* (1789) 3 T. R. 186; *Van Valen* v. *Lapham* (N. Y. 1856) 13 How. Pr. 240; it being held that any other rule would force an unwarranted burden upon the plaintiff. *Clark* v. *Magruder* (Md. 1807) 2 Har. & John. 77. This is the rule by statute to-day. *Jump* v. *Leon* (1906) 192 Mass. 511. Yet as in equity the rule is to grant relief as of the time of the decree, it is the practice to grant affirmative relief on cross petitions founded on facts arising after the bringing of suit. *French* v. *Bellows Falls Sav. Inst.* (1896) 67 Ill. App. 179; *Madison Ave. Bap. Ch.* v. *Oliver St. Bap. Ch.* (1878) 73 N. Y. 82. Accordingly in divorce actions, which are equitable, the same rule prevails, even to the extent of granting a divorce on such cross petition. *Neddo* v. *Neddo* (1896) 56 Kas. 507; *Fuller* v. *Fuller* (1886) 41 N. J. Eq. 198.

QUASI-CONTRACTS—RECOVERY FOR MISTAKE INDUCED BY FRAUD.—The plaintiffs paid the defendants for bonds sold to one Valentine, relying on the latter's false representation that he was buying for a customer. Upon discovering the fraud the plaintiffs tendered the bonds to the defendants and demanded back their check. *Held,* two judges dissenting, the plaintiff could recover as for money paid under a mistake of fact, induced by a third party's fraud. *Ball* v. *Sheppard* (1909) 120 N. Y. Supp. 830.

Since the action for money had and received on an implied assumpsit is equitable in nature, Keener, Quasi-Contracts 26, the grounds for recovering money paid by mistake are similar to those for obtaining affirmative relief for mistake in equity. Thus where the mistake is mutual and affects the existence, identity or quantity of the subject matter, relief may be had in equity, *Cole* v. *Fickett* (1901) 95 Me. 265, and money paid can be recovered on the ground that there was no consideration for the payment. *Little* v. *Derby* (1859) 7 Mich. 325. On the same ground money paid under the mistaken belief that it was due can be regained. *Vernon* v. *West School Dist.* (1871) 38 Conn. 112. But no action lies because of mere unilateral mistake, *Okill* v. *Whittaker* (1847) 2 Ph. 338; and see *Placer Bank* v. *Freeman* (1899) 126 Cal. 90, unless induced by the fraud, *Bull* v. *City of Quincy* (1893) 52 Ill. App. 186, or fraudulent conduct of the other party. 10 COLUMBIA LAW REVIEW 75. A mistake which, though mutual, is merely collateral to the transaction sought to be set aside, affords no basis for relief in law or equity. *Hecht* v. *Batchellder* (1888) 147 Mass. 335; *Semple* v. *Bridgeforth* (1894) 72 Miss. 293. The mistake in the principal case was unilateral, induced by the fraud of a third person, and collateral to the transaction between the parties. Therefore, since the defendants acting in good faith gave value for the check, relief should have been denied.

REAL PROPERTY—COVENANTS AGAINST INCUMBRANCES—DAMAGES OF ASSIGNEE.—The defendant conveyed land with covenants against incumbrances to X, who conveyed with like covenants to the plaintiff. The land was in fact occupied by tenants of a former owner. X subsequently assigned the defendant's covenants to the plaintiff, who sued thereon. *Held,* the plaintiff could recover only nominal damages. *Simons* v. *Diamond Match Co.* (Mich. 1909) 123 N. W. 1132.

In most jurisdictions a covenant against incumbrances does not run with the land, since it is broken when made, if at all, and is there-

after a mere chose in action. *Clark* v. *Swift* (Mass. 1841) 3 Metc. 390; 8 COLUMBIA LAW REVIEW 145. Since the covenantee can obtain only nominal damages until his possession is disturbed, *Willets* v. *Burgess* (1864) 34 Ill. 494, or the incumbrance is removed, *Eaton* v. *Lyman* (1872) 30 Wis. 41, after conveying to a third person he cannot recover for the loss resulting to his grantee from the breach. *Pillsbury* v. *Mitchell* (1856) 5 Wis. 17. Where, however, a covenant against incumbrances or of seisin is held to run with the land, *Foote* v. *Burnet* (1840) 10 Oh. St. 317, as well as in jurisdictions which recognize an implied assignment of the broken covenant with the second conveyance, the assignee may recover substantial damages from the covenantor, although his grantor's injury was wholly nominal. *Security Bank* v. *Holmes* (Minn. 1896) 68 N. W. 113; *Clarke* v. *Priest* (1896) 42 N. Y. Supp. 766; *Kimball* v. *Bryant* (1879) 25 Minn. 496. The decision in the principal case, where the covenant was expressly assigned to the grantee, is supportable on the ground that a promisee should not be permitted to enhance damages by assigning his contract after a breach. Since, however, the initial breach of a covenant against incumbrances is purely technical, *Wyatt* v. *Dunn* (1887) 93 Mo. 459, and of consequence only in relation to subsequent events, it seems desirable to regard the actual loss due to incumbrances as the substantial breach of covenant. *Winningham* v. *Pennock* (1889) 36 Mo. App. 688. In such event, the result reached where an assignment is implied should follow, and the express assignee should recover for his loss.

SALES—FOODS—WARRANTY OF WHOLESOMENESS.—The plaintiff, a butcher, after inspection bought from the defendant, a farmer, a beef cow which subsequently proved to be unfit for food. *Held*, there was no implied warranty of wholesomeness. *Wart* v. *Hoose* (1909) 119 N. Y. Supp. 1107.

On the questionable authority of old criminal statutes early decisions in the case of a sale of provisions to a consumer implied a warranty of wholesomeness. See review of authorities in *Burnby* v. *Bollett* (1847) 6 M. & W. 644. Though in the absence of additional circumstances the better rule is that no warranty should be raised, *Geroux* v. *Stedman* (1887) 145 Mass. 439, the older decisions find some support on the ground that the wholesomeness of provisions is of great importance to the public. *Hoover* v. *Peters* (1869) 18 Mich. 51. When, however, the sale is by a farmer to a dealer, Hanson *v.* Hartse (1897) 70 Minn. 282; Warren *v.* Buck (1898) 71 Vt. 44, or by one dealer to another, *Emmerton* v. *Mathews* (1862) 7 H. & N. 582; *Smith* v. *Baker* (1878) 40 L. T. [N. S.] 261, the authorities though sometimes stating that a different result may obtain as between dealer and consumer, hold that the principle of *caveat emptor* controls, unless it appears that there has been no inspection by the purchaser and that he has relied on the seller's skill and judgment. *Brett* v. *Flint* (1885) 58 Vt. 543; *Morse* v. *Union Stockyard* (1891) 21 Ore. 289. And a warranty of merchantableness is also implied where the sale has been not of a specified chattel but one by description. *Wren* v. *Holt* L. R. [1903] 1 K. B. 610; *Morse* v. *Union Stockyard, supra.* The principal case, therefore, is in accord with the authorities, but its intimation that an implied warranty exists in all cases of sale to a consumer is hardly supportable.

SALES—WAIVER OF CONDITIONS—ACTS CONSTITUTING ACCEPTANCE.—The vendee bought a machine conditioned to work satisfactorily. Before opportunity for testing it, he gave a chattel mortgage on the machine, the mortgagee knowing the conditions of the original contract. *Held,* Houghton J. dissenting, the giving of the mortgage did not as a matter of law constitute an acceptance of the goods. *Harrison* v. *Scott* (1909) 120 N. Y. Supp. 377.

By accepting the goods, the vendee waives a condition that they be of a certain quality. *Avery* v. *Burrall* (1898) 118 Mich. 672. The acceptance may be indicated by the exercise of any act of ownership over the goods. *Brown* v. *Foster* (1888) 108 N. Y. 387. A resale, *Rock Island Plow Co.* v. *Meredith* (1899) 107 Ia. 498, an attempt to resell, *Parker* v. *Palmer* (1821) 4 B. & A. 387, a use of the goods, *Dennis* v. *Stoughton* (1883) 55 Vt. 371, loaning the goods, *Hensen* v. *Beebe* (1900) 111 Ia. 534, 537, and a refusal to allow the vendor to take back the goods, *Fry-Sheckler Co.* v. *Iowa Brick Co.* (1898) 104 Ia. 494, constitute such acts. Giving a chattel mortgage has the same effect; *Van Winkle* v. *Crowell* (1892) 146 U. S. 42, 49; *Leggett & Meyer Tobacco Co.* v. *Collier* (1893) 89 Ia. 144, 150; particularly as in the jurisdiction of the principal case a chattel mortgage passes title to the goods. *Blake* v. *Corbett* (1890) 120 N. Y. 327. While recognizing this rule, the majority opinion in the principal case regards it as applicable only where the vendee has had an opportunity to examine the goods. There appears to be no basis for such a limitation. *Wolf* v. *Dietzsch* (1874) 75 Ill. 205. Also, it is difficult to see how the mortgagee's knowledge of the conditions of the contract could affect the question of acceptance of the goods by the vendee. Had there been an agreement between the vendee and the mortgagee qualifying the effect of the mortgage, the vendee's act might have been regarded as equivocal. Since nothing of this sort appears, it would seem that the holding of the principal case is unsound.

SPECIFIC PERFORMANCE—INNOCENT PURCHASER—EFFECT OF QUIT-CLAIM DEED.—The plaintiff as vendee sought specific performance of a contract for the sale of land. The vendor had subsequently conveyed all his right, title and interest in the land to the defendants. *Held,* the defendant was not a *bona fide* purchaser for value. *Hudman* v. *Henderson* (Tex. 1910) 124 S. W. 186.

A quit-claim deed of the grantor's right, title and interest is generally held not to confer on the grantee the rights of an innocent purchaser for value as against equities affecting his grantor's title. *Runyon* v. *Smith* (1883) 18 Fed. 579. This rule is sometimes upheld on the ground that such a deed passes only that interest which the grantor can lawfully convey. *Derrick* v. *Brown* (1880) 66 Ala. 162. Since the grantor's legal title passes by either form of conveyance, *Moelle* v. *Sherwood* (1892) 148 U. S. 21, 29; see *Chapman* v. *Sims* (1876) 53 Miss. 154, 169, and since the legal title in a purchaser for value is subject only to the equities of which he had notice at the time of purchase, *Carter* v. *Allan* (Va. 1871) 21 Grat. 241, 249, it seems that a quit-claim should cut off equities as effectually as a warranty deed in the absence of actual or constructive notice. The rule must therefore rest on the reason commonly assigned, that a quit-claim deed is constructive notice of defects in the grantor's title. *Lowry* v. *Brown* (Tenn. 1860) 1 Cold. 456. In these cases it is noteworthy, however, that facts usually existed which tended to prove

notice to the purchaser. In jurisdictions where a clear title is usually conveyed by warranty deeds, the vendor's refusal to warrant his title may fairly be deemed sufficient to put his vendee on inquiry as to outstanding equities. *Peters* v. *Cartier* (1890) 80 Mich. 124. Where, however, a quit-claim conveyance is the usual mode of passing title, such notice could scarcely be implied, and the rule would seem to have no just application. *Moelle* v. *Sherwood supra; Chapman* v. *Sims supra.* Accordingly, several courts hold that the question of *bona fide* purchase is one of fact in each case, and does not depend on the form of conveyance. *Brown* v. *Banner Oil Co.* (1880) 97 Ill. 214. The principal case, however, is supported by the weight of authority in this country.

TRESPASS—NECESSITY A DEFENSE—LIABILITY FOR DAMAGE CAUSED.—Defendant, to save his ship in a storm, without negligence maintained her moorings to a dock, which was damaged by the pounding of the vessel. *Held,* two judges dissenting, the owner of the dock was entitled to recover for the injury to his property. *Vincent* v. *Lake Erie T. Co.* (Minn. 1910) 124 N. W. 221.

The recognition of necessity as a justification in trespass implies a subordination of the so-called absolute rights to others deemed superior in importance. Thus private property rights are properly overbalanced, not only by the public necessities arising out of danger to the general welfare, *Seavy* v. *Preble* (1874) 64 Me. 120; *Harrison* v. *Wisdom* (1872) 7 Heisk. 99, but also by private necessity in the preservation of life, *Mouse's Case* (1609) 12 Co. Rep. 63, or even of property when the subject of the right invaded is causally connected with the danger to be averted. *Wadhurst* v. *Damme* (1605) Cro. Jac. 45. But where, as in the principal case, the object damaged in on way contributes to the impending disaster, there seems no reason for permitting the injury to pass without compensation. On principle, however, no relief is obtainable in trespass, for although decisions have gone no farther in recognizing necessity as a justification than to exempt the invader from the incidental liabilities of a wrongdoer, *Ploof* v. *Putnam* (1908) 81 Vt. 471; *Metallic C. C. Co.* v. *Fitchberg R. R. Co.* (1872) 109 Mass. 277, or from a trespasser's liability for consequential, *Morrison* v. *Thurman* (1856) 66 Am. Dec. 153, or nominal damage, *Proctor* v. *Adams* (1873) 113 Mass. 376, the existence of direct, substantial damage clearly cannot render the entry unlawful. Relief has been given, however, in a few analogous cases on the basis of a contract implied in law. *Sheldon* v. *Sherman* (1870) 42 N. Y. 484; *M'Sorley* v. *Faulkner* (1892) 18 N. Y. Supp. 460. Such alternative, it is true, may be objectionable because based at best upon a negative enrichment. See *Phillips* v. *Homfray* (1883) 24 Ch. Div. 439. The equities in the principal case, however, demand a recovery; and an action *ex contractu* is desirable as recognizing both the lawfulness of the defendant's act and his obligation to make compensation. The decision is therefore proper.

USURY—COMMISSIONS TO LENDER'S AGENT.—The plaintiff's agent, in negotiating a loan to defendant, in addition to the legal rate of interest exacted a commission for himself. *Held,* the additional charge having been made without plaintiff's knowledge and consent was not usurious as against him. *Silverman* v. *Katz* (1910) 120 N. Y. Supp. 790. See Notes, p. 348.

WILLS—POWERS—LIFE ESTATE WITH POWER OF SALE.—A wife was bequeathed the residue of her husband's property for life, with power to sell so much of the same as was necessary for her support. *Held,* three judges dissenting, the sale under the power was within the wife's discretion so long as not fraudulent toward the remaindermen. *Griffin* v. *Nicholas* (Mo. 1909) 123 S. W. 1063.

While admitting that the testator's intention should control, courts have differed in interpreting devises to one for life with a power to sell, if necessary for the support of the devisee. *Stevens* v. *Winship* (Mass. 1823) 1 Pick. 318; *Paxton* v. *Bond* (1891) 15 S. W. 875. On the one hand, it would seem clear that there is no intent to give a fee; *Hull* v. *Culver* (1867) 34 Conn. 403; on the other, the absence of intermediate trustees evidences the testator's faith in the discretion of the devisee. *Copeland* v. *Barron* (1881) 72 Me. 206. To hold that a court order is necessary to permit a sale seems to impose on the court the duties of trustees, where the testator has expressly omitted them. *Bartlett* v. *Buckland* (1906) 78 Conn. 517. To make the validity of the sale hinge on a subsequent finding of a jury that the necessity, as a fact, had arisen, *Minnot* v. *Prescott* (1782) 14 Mass. 496, is open to a similar objection in that a jury's discretion is substituted for that of the devisee, and as shown in *Richardson* v. *Richardson* (1888) 80 Me. 585, renders the power practically worthless. Again to hold, as does the prevailing opinion in the principal case, that a court may intervene only in the event of actual fraud toward the remaindermen, *Copeland* v. *Barron supra,* seems to lay down too broad a rule and one inconsistent with the contingency on which the exercise of the power was to depend, namely the necessity of the sale for the support of the devisee. Whether the determination of this necessity is within the province of a jury or of the devisee, the fact remains that in either event it is a condition precedent to the exercise of the power. It is submitted that the devisor's intention is best carried out, while the devisee's interest is adequately subserved, by holding that the power is contingent on the devisee's honest belief that the contingency has arisen.